NO. 22246

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD L. CALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

STATEMENT OF THE ISSUES

Appellant's Opening Brief raises the following issues:

1. Was there probable cause for the arrest of appellant for lobster poaching and/or the search which revealed the marihuana?

2. Was there in fact an arrest so that the search could be justified as being incident?

   a. When confronted by the game wardens was the appellant taken into custody (i.e. arrested) or was he merely detained?

   b. Assuming that he was taken into custody did

the failure of the officers to strictly comply with the California statutory arrest procedure invalidate the arrest, and, therefore, the search?

3. Was the search, which revealed the marihuana, a valid search?

   a. Was it incident to the arrest of the appellant?

   b. Assuming that the search was not made incident to an arrest could it be justified on the basis of the "exigent circumstances" doctrine?

   c. Would the fact that California Fish and Game Wardens are given statutory authority to inspect containers for illegal lobster validate the search?

II

STATEMENT OF FACTS

Because the issues on appeal in the instant case are grounded heavily in the events of October 4, 1966, the date of appellant's arrest, the Government finds it necessary to render a rather elaborate factual statement.

California Fish and Game Warden Joseph B. DuPont was the initial arresting officer and the Government's primary witness during the hearing on the motions. Warden DuPont testified that

he had been a warden for approximately three and one-half years (Reporter's Transcript, p. 105). 1/ He was a man who was conversant with lobster fishing techniques (R. T. p. 161), and his responsibilities as a warden included the enforcement of lobster regulations (R. T. p. 107). He had had experience with fishermen illegally taking and possessing lobsters out of season (lobster poaching) (R. T. p. 107), and, in fact, had made so many arrests for lobster poaching that he "couldn't even begin to elaborate on that." (R. T. p. 145). He was familiar with the fact that lobster poaching is a profitable enterprise and is frequently engaged in prior to the opening of lobster season (R. T. p. 107). DuPont knew that there had been at least three arrests for lobster poaching at Paradise Cove, California, and he had been involved in one of them (R. T. pp. 108, 140). During some of the arrests he had made, the poachers were carrying lobsters in duffle bags (R. T. p. 164).

During the evening hours of October 4, 1966, Warden DuPont, his partner, and another passenger were cruising in a Fish and Game vehicle on the Pacific Coast Highway, near Malibu, California (R. T. p. 105). They were patroling that night specifically for lobster poachers since the next day (starting at 12:01 A. M.) was the beginning of lobster season (R. T. pp. 106, 107). It was recognized by the warden that lobster poachers, who had taken the lobsters prior to the opening of the season, would

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1/ Hereinafter abbreviated as "RT".

attempt to bring their illegal catches in early so they would be first to market (R. T. p. 107).

At approximately 11:30 P. M. (R. T. p. 109) Warden DuPont and his companions drove their patrol vehicle into the area surrounding Paradise Cove, California (R. T. p. 108). The evening was rather cool (R. T. p. 115), and extremely quiet (R. T. p. 123), and the two wardens parked their vehicle at the foot of the Paradise Cove pier which jutted into the Pacific before them (R. T. p. 108). Glancing in a southerly direction, Warden DuPont noticed a sport fishing vessel "right in the breaker line almost on the beach" (R. T. p. 108). The warden observed that "it had no lights on it whatsoever, and it was in an unusual position in that the breakers were breaking right underneath the boat, and it was extremely close to shore" (R T. p. 109), in a most hazardous position (R. T. pp. 113, 125). Furthermore, the stern was facing the beach, again, a rather unusual position for a boat so close to shore (R. T. p. 109). Occasionally, the engine would be started on the boat, apparently to "keep it off the beach" (R. T. p. 113).

Warden DuPont began to observe this oddly situated vessel through binoculars (R. T. p. 112), and he saw "people moving around on the boat" (R. T. p. 113). He could also see "people swimming in the water between the boat and the shoreline, "but he could not estimate how many" (R. T. p. 115).

Their curiosity aroused, the wardens returned to their patrol vehicle and drove back to the Pacific Coast Highway (R. T. p. 116). Eventually, they found an access road and drove down

to a location close to the wallowing boat (R. T. pp. 116-117).

Upon reaching this location, the wardens observed activity both on the beach and the boat (R. T. p. 117). They saw three individuals on the beach (R. T. p. 117), and a raft commuting from the boat to the shore (R. T. p. 118). The raft would be loaded from the boat with large bags, and, then, would ply the distance between boat and beach (R. T. p. 118). Upon reaching shore, the raft would be unloaded and the large bags piled on the sand (R. T. p. 118) approximately seventy-five feet from the wardens (R. T. p. 160). The wardens observed four or five such trips (R. T. p. 119), and that there were a number of bags piled before them (but not an unusual number for a large catch of lobster (R. T. p. 161)).

After the raft had made its last trip, one of the individuals on the beach was heard to say "That's all of them," (R. T. p. 119), and two of the individuals began to carry bags up a stairway which ran from the beach to the clifftop (R. T. p. 119).

After the two individuals had departed, Warden DuPont sprang from his hiding place, ran toward the individual still standing on the beach, identified himself as a State Fish and Game Warden, and flashed his light on his badge (R. T. p. 121). Upon reaching the individual, DuPont found appellant standing shirtless, in soaking wet pants (R. T. p. 124), with a duffle bag in his hand (R. T. p. 163). Immediately, the other two individuals, who had now reached the top of the ridge with their bags, began to run in a direction other than toward the wardens (R. T. p. 121). The

appellant was asked what he was doing and he replied, "We are just bringing stuff ashore." (R. T. p. 122). In the meantime, DuPont's partner had begun to yell at the boat "State Officers", and they both flashed their lights on the vessel revealing the name "Todo-Mio" (R. T. p. 122). The boat immediately "got underway" and headed straight out of Paradise Cove running with no lights (R. T. p. 123).

With suspects fleeing in every direction, Warden DuPont told his partner to watch appellant (R. T. p. 124), since he was now firmly convinced that appellant was involved in taking lobster illegally in violation of California Fish and Game Code, §§8250, 8251 (R. T. pp. 124, 125, 150).

Leaving the appellant in the custody of his partner the warden ran up the stairs previously ascended by the two other suspects (R. T. p. 124). At the top of the cliff he found a station wagon standing with its tailgate open (R. T. p. 126). Upon this open tailgate, there lay a duffle bag similar to the ones on the beach and the one that the appellant was clutching (R. T. pp. 126, 146). The warden opened the bag and found, not spiny lobsters (species Panulirus Interruptus), but, instead, a leafy green substance resembling marihuana, wrapped in plastic (R. T. pp. 127-128, 146).

After making this observation, the warden ran along a road in pursuit of the fleeing suspects following two sets of damp footprints for a quarter mile (R. T. p. 128). Finding a camper truck (R. T. p. 129), he peeked inside its cab and saw a duffle

bag, similar to the ones seen before that evening, resting on the front seat (R. T. p. 130). He also noticed a note on the turn indicator (R. T. p. 130) which read "Jeff. Important. Get a hold of Duncan as soon as possible. Raft will be in back of station wagon. I will be back at 11:30 P. M., key to truck on visor. Tonight. Pete." (Emphasis added)(R. T. p. 132).

Reaching inside the cab the warden took the ignition keys (R. T. p. 132). He then trotted back down the road and found that his partner and appellant were standing by the station wagon dutifully awaiting his return. He told his partner what he had found and told him to advise the appellant of his constitutional rights and place him under arrest for a new offense, that of violation of state narcotics laws (R. T. p. 132).

III

ARGUMENT

A. INTRODUCTION

The appellant has chosen to divide his brief into four sections each discussing a separate aspect of his appeal. However, the Government has endeavored to consolidate two of these points into one, and, therefore, its brief will only have three main sections.

The first section of the Government's brief will deal with probable cause both for the arrest and/or the search which

revealed the marihuana. The second section will be directed at whether the appellant was arrested when the fish and game wardens restrained him on the beach. The third section will deal with the propriety of the search itself.

B. CONSIDERING ALL THE FACTS AND CIRCUMSTANCES, THERE WAS PROBABLE CAUSE FOR AN ARREST OF APPELLANT, AND/OR A SEARCH

The appellant has raised two probable cause issues. The first deals with whether there was sufficient probable cause to arrest him for the crime of lobster poaching, because he feels that if there were not, then the search incident to the arrest would be invalidated and the motion to suppress should have been granted. The second assumes that there was no arrest of the appellant, and then takes the tack that there was no probable cause for a search prior to the arrest of appellant for violation of California narcotics laws. Since the same facts and circumstances would generate probable cause in either case, the Government has chosen to treat the probable cause issues as one, with the thought that this Court can view the arrest probable cause and the search probable cause through the same legal lense.

California Fish and Game Wardens are given the authority as peace officers to arrest persons under California Fish and Game Code §§851 and 856. The penalty for violations of California Fish and Game Code §8251 (taking lobster out of season), and

§2002 (possession of illegally taken lobster), is a misdemeanor. California Fish and Game Code §1200. Under §836 of the California Penal Code, peace officers are given the authority to make an arrest without a warrant "whenever he has reasonable cause to believe that the person to be arrested has committed a public offense (i. e. misdemeanor) in his presence."

Therefore, the probable cause issues narrow down to simply this; what facts and circumstances would generate sufficient probable cause for a California Fish and Game Warden to make an arrest and/or search in a lobster poaching situation occurring his presence.

The general rule concerning probable cause has been frequently ennunciated by the Supreme Court. Probable cause exists if the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed. Carrol v. United States, 267 U.S. 132, 162 (1925); Henry v. United States, 361 U.S. 98, 102 (1959). Whether an arrest is constitutionally valid depends upon whether, at the moment the arrest was made, the officer had probable cause to make it -- whether at that moment the facts and circumstances within his knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the defendant had committed or was committing an offense. Beck v. Ohio, 379 U.S. 89, 91 (1964).

It would not be going too far to say that this is an excellant case in which to apply the rationale that the facts and circumstances

surrounding the events of October 4, 1966 were more than sufficient in the eyes of an expert peace officer since Warden DuPont and his partner were specialists trained to look for lobster poachers. In such a case their eyes are able to detect more than the average person, and probable cause for them is of a little different nature. See People v. Gill, 248 Cal. App. 2d 189. 56 Cal. Rptr. 88 (1967); Ellis v. United States, 264 F. 2d 372 (D. C. C. Cir. 1959); cert denied, 359 U. S. 998, 79 S. Ct. 1129.

Because of the rarity of the subject matter, there are not an overwhelming number of cases dealing with probable cause for game warden arrests or searches. However, the court's attention is respectfully drawn to the following cases gleaned from the state reports. State v. Putzke, 7 Ohio App. 18, 218 N. W. 2d 627 (1966); State v. Krogness, 238 Ore. 135, 388 P. 2d 120 (1963), cert denied 377 U. S. 992; Phillips v. State, 159 Tex. Cr. R. 286, 263 S. W. 2d 159 (1953); State v. Engles, 2 N. J. Super. 126, 64 A. 2d 897 (1949); State v. Evans, 22 P. 2d 496 (1933); State v. Leadbetter, 246 N. W. 443 (1933).

The appellant cites many cases that support his proposition that mere suspicion is not enough to justify an arrest and/or a search, and the Government has no quarrel with that. However, the Government would submit that the circumstances go far, far beyond suspicion. On that chilly night in October of 1966 probable cause was rampant on the beach at Paradise Cove.

Consider the situation as set forth in the Government's statement of facts. October 4, 1966 was the day before lobster

season officially opened. It was known that lobster poachers frequently take lobster before the official opening and transport them to market early so that they can receive the best prices. California game wardens had been alerted to this, and the fact that lobster poachers might be bringing in their catches in the evening hours of October 4. Warden DuPont and his partner were assigned the task of watching for lobster poachers. DuPont had made so many lobster poaching arrests, one at Paradise Cove, that he couldn't begin to estimate the number. He had made arrests of persons carrying illegal lobsters in duffle bags. As the wardens drove their automobile up to the pier at Paradise Cove they observed a sport fishing craft, not at the dock as would be customary, but down the coast in a southerly direction. The craft had no lights visible, was dangerously near the shore, with its stern facing toward the beach. After observing the boat for a time, the wardens observed people moving about on it, and people actually swimming in the chilly October waters of the Pacific between the craft and shore. Moving closer, for a better look, the wardens observed that a raft was commuting between the boat and the shore, loaded with duffle bags. They saw three men speaking in low voices at the shore line and stacking the bags on the sand. It was estimated that the time these events occurred was between 11:30 P. M. and midnight.

After watching the last duffle bag being brought ashore, the wardens ran from their hiding place and identified themselves. Immediately, two of the individuals with appellant began to run,

and the boat sped away running with no lights.

In summary, the facts and circumstances observed by the wardens, heaped one upon the other, clearly indicated to them that the appellant was committing the crime of lobster poaching. The trial court's reasoning in this regard is found at pages 244-45 of the Reporter's Transcript and is cogent and to the point. The facts of the instant case clearly demonstrate that there was probable cause. It was late at night; the day before lobster season opened; the boat was unloading in an unconventional manner in a dangerous position; lobster poachers frequently conduct operations prior to the official season; the bags used were of a type used before and could be used to conceal illegally taken lobster; when identification was tendered by the wardens everyone except the appellant began to run. Nowhere in the above cited fish and game cases is there anything to match the number of facts and circumstances that generate the probable cause in this case.

In State v. Putzke, supra, fish and game wardens were inspecting for undersized fish. They observed the defendant's boat docked next to his processing plant, but the motor was still running. Also, when the wardens approached an individual ran around a corner. The Court held that because of the circumstances there was probable cause for an inspection and arrest.

In State v. Krogness, supra, the defendant's motor vehicle was stopped for a traffic violation and a rifle with a telescopic sight was observed in the back seat. The defendant was a known

petty hoodlum. A search of the trunk of the automobile revealed burglary tools and the defendant's subsequent conviction for burglary was upheld because the court felt that the arresting office had probable cause to believe that a fish and game violation had occurred.

In Phillips v. State, supra, an automobile was observed by wardens being driven along a road at midnight. They followed the car, observed a spotlight being shined upon some deer, and saw a rifle flash. A deer was never seen to fall. After the wardens approached the defendant, he sped away in his automobile. The defendant was followed and arrested. A search revealed the carcass of a deer in the trunk of the defendant's automobile. Held probable cause for arrest and search.

In State v. Evans, supra, a warden was informed that the defendants had obtained a fire permit. Apparently, it was obtained while elk were out of season. The warden hiked through the area in which the defendant represented he would be and came upon the defendant and a companion with mules, gunny sacks and blood stained shirts. The defendant told a conflicting story about the location of his camp and when the warden did find the camp he found the defendant sitting with a rifle across his lap. With nothing more the court held that the warden had probable cause to arrest the defendant and search his camp and the surrounding woods for the illegally slain elk which were eventually found.

Finally, in State v. Leadbetter, supra, game wardens were patrolling on a snowy day in January. They saw tire tracks

heading in the direction of a nearby trout pond. It was not the season for ice fishing so the wardens investigated and saw a stalled automobile, and the defendant walking away from the pond with an ice chisel over his shoulder. The court held that there was enough probable cause to arrest the defendant and search his automobile, such search revealing illegally caught trout.

In conclusion, the Government would submit that when one considers the general principles relative to probable cause, the cases which deal with probable cause in fish and game arrests and searches, and the facts and circumstances of the instant case, there is no conclusion other than there was more than sufficient probable cause in the evening of October 4, 1966 to arrest the appellant for lobster poaching and/or search the duffle bag.

C. UNDER THE CIRCUMSTANCES THE ACTS OF THE GAME WARDENS, IN FACT AND IN LAW, CONSTITUTED AN ARREST OF APPELLANT, AND, THEREFORE, THE SEARCH INCIDENT THERETO WAS VALID

The appellant seems to be arguing throughout his brief in the alternative in that in Section I he concedes that he was arrested but argues that there was no probable cause. However, in Section II of his brief he argues (1) that there was no arrest, but merely a detention and/or (2) even if there was more than a detention, the wardens did not comply with California arrest statutes, and, therefore, the arrest was invalid. He then argues,

that since there was no arrest, the arrest was invalid.

1. Appellant was arrested when restrained by the wardens on the beach.

The appellant contends that the initial confrontation by the wardens was merely a detention, rather than an arrest, and he has gone to great lengths to detail the law in the area of detentions versus arrests.

The Government would submit, however, that the stopping here was not a detention for questioning, but an arrest, and this is clearly demonstrated by the facts and circumstances. There may have been an initial detention, but as the situation evolved, the appellant was reduced to custody when Warden DuPont instructed his partner to watch appellant while he went to look for the fleeing suspects.

The Government, before detailing its argument, will set forth briefly a discussion of the law in this particular area of arrest.

The Supreme Court has held that the law of the state where an arrest without a warrant takes place determines the validity of the arrest. United States v. Di Re, 332 U.S. 581, 68 S.Ct. 22 (1948). This Court has construed California arrest statutes in the past. Wilson v. Porter, 361 F.2d 412 (9th Cir. 1966); Morales v. United States, 344 F.2d 846 (9th Cir. 1965).

As stated above in appellee's section "B", California game wardens have the authority to arrest as peace officers. Therefore, their authority and guidance as to arrests is taken

from the California Penal Code as defined in §§834 and 835 of that volume.

Section 834 of the California Penal Code states in pertinent part as follows:

> "An arrest is taking a person into custody, in a case and in the manner authorized by law."

Section 835 of the California Penal Code states in pertinent part as follows:

> "An arrest is made by an actual restraint of the person, or by a submission to the custody of an officer." (Emphasis added).

This last section is directly in line with the Supreme Court's ruling in Henry v. United States, 361 U.S. 98, 103, 80 S.Ct. 108 (1959), in which the Court held that when officers interrupt the movement of a defendant and restrict his liberty of movement an arrest is complete.

In relation to the theory that arrest is synonymous with custody, the California Supreme Court has defined "custody" as occurring if the suspect is physically deprived of his freedom of action in any significant way or is led to believe, as a reasonable person, that he is so deprived. People v. Arnold, 66 Cal. 2d 438, 448, 58 Cal. Rptr. 115, 426 P. 2d 515 (1967). Furthermore, a California court has stated that:

> "A temporary detention may be akin to an arrest inasmuch as during the time of such detention, the person detained, if he is physically deprived of

his freedom of action in any significant way, can be considered to be in custody." People v. Villareal, 68 Cal. Rptr. 610, 262 A. C. A. 442 (1968).

It must be noted that the facts of the Villareal case, supra, at least as far as the initial stopping of the defendant is concerned, are very close to the facts of the instant case. There, a police officer saw a potential defendant, flashed his light on his badge, identified himself as a police officer, and asked the defendant to identify himself. After the defendant told the officer to "go to hell" he was placed against a wall. The court held that this detention constituted custody and was akin to an arrest.

With the above cited statutes and cases in mind, it is now incumbent upon this Court to survey the facts of the instant case to see if the defendant was in fact arrested when the wardens confronted him on the beach.

The facts reveal that when Warden DuPont sprang from his hiding place he identified himself as a game warden and flashed his light upon his badge. The wardens also yelled "State Officers" at the boat. Suddenly, the situation began to unravel, because two of the suspects on the cliff began to run, and the boat got underway heading straight out to sea. Warden DuPont instructed his partner to watch the appellant while he went to the top of the cliff to locate the other suspects. It was at this point that the appellant was reduced to custody. He stood there in his soaking wet pants with a duffle bag in his hands. He was not going

anywhere, and he knew it. Later, he accompanied his custodian to the top of the cliff and dutifully waited the return of DuPont. His liberty and movement were as restrained as they could be.

The appellant was actually restrained, his movement was interrupted and his liberty restricted. He was physically deprived of his freedom of action in a significant way, and he was led to believe that he was so deprived. In short, the appellant was in custody (i. e. under arrest). Therefore, there could be a search incident to this arrest, and, in fact there was such a search.

Appellant in Section II of his brief occasionally makes the argument that he was not arrested since the wardens had no intent to arrest him on the beach, and this intent is evidenced by the fact that they "rearrested" him for the narcotics violations. The Government would simply answer this contention by saying that there is nothing wrong with arresting someone twice if two separate offenses have been committed. Warden DuPont testified that he normally would arrest someone again, having previously arrested him, if the second offense were more serious (R. T. p. 170). In fact, he testified that he was required to do so, although the expressed authority was not mentioned (R. T. p. 170). To say that the procedure of placing a person under arrest for another crime indicates that the arresting officer did not have the intent to arrest initially; is absurd.

The Government submits that the appellant was arrested initially on the beach, and, therefore, the search which produced the marihuana was a valid one being incident to the arrest.

2. The appellant's arrest did comport with the California arrest statutes and was valid.

In the second part of Section II of his brief, the appellant is apparently asserting that even if he was arrested under the common-law definition, the wardens did not comply with the California statutory requirements for a proper arrest, and therefore, the arrest was invalid. If the arrest was invalid, the appellant feels that the search would also have to be invalid.

The arrest statute referred to by appellant is California Penal Code, §841 which reads as follows:

> "The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person making the arrest has reasonable cause to believe that the person to be arrested is actually engaged in the commission of or an attempt to commit an offense." (Emphasis added)

The appellant would have this Court apply the first part of this statute to invalidate the arrest. However, there are exceptions to the formal procedure outlined, one of which is built directly into the section (this exception was recognized by this Court in Ward v. United States, 316 F. 2d 113 (9th Cir. 1963), cert denied 375 U. S. 862, 84 S. Ct. 132). Another exception to this formal procedure for arrests has been recognized. If there are "exigent circumstances", such as the possibility that evidence

might be destroyed, then peace officers are excused from going through the statutory routine. See People v. Maddox, 46 Cal. 2d 301, 294 P. 2d 6 (1956); Dagampat v. United States, 352 F. 2d 245 (9th Cir. 1965); Ker v. California, 374 U.S. 23 (1963), Miller v. United States, 357 U.S. 301 (1958).

Both of these exceptions apply in this case because a crime was being committed in the presence of the officers, and there were exigent circumstances which compelled Warden DuPont to make the search. Therefore, the statutory formalities did not have to be complied with, and the search was valid as incident to a lawful arrest.

As to the statutory exception dealing with arrests while the arrestee is engaged in the crime, the appellant would have this Court take the position that the offense of lobster poaching commences and terminates when the crustacean is raised from the watery depths. Not so. The crime continues from the time that the lobster is extracted from its rocky cavern or enters the trap until it is illegally transported to its destination at table, tavern, or market. It is a crime in California both to take lobster out of season (California Fish and Game Code §8251) and to possess such lobster (California Fish and Game Code §2002). Both of these acts constitute the crime of lobster poaching since they are in effect one in the same crime. One cannot take without also possessing, and conversely, one cannot possess without having first taken. Therefore, to say that the appellant was not committing the crime of lobster poaching (or so the wardens

reasonably believed), when the wardens were observing him, is falacious. The wardens felt that he was illegally transporting and possessing lobster that had been illegally taken, and that constitutes lobster poaching.

Thus, a crime was being committed in the presence of the wardens, so they thought, and the statutory exception of §841 applies.

But yet another exception applies here. When the wardens announced themselves, two suspects on the cliff who had been carrying duffle bags began to run. Thus, the wardens could reasonably suspect that evidence would soon be destroyed, and action should be taken immediately to preserve it and apprehend the suspects if possible. This is clearly a case where the exigent circumstances rule would apply, and the formalities of an arrest need not be undertaken. This doctrine will be more fully developed in appellee's Section "C".

Once again, appellant attempts to demonstrate an awareness of the violation of §841 by pointing to the "rearrest" of the appellant. As pointed out before, this rearrest shows nothing except that the officers were performing a reasonable act required of them.

In conclusion, because of the exceptional circumstances surrounding this arrest, the wardens were justified in omitting the statutory formalities and the arrest of the appellant was valid in law.

3. If there is probable cause to make an arrest, violations of California Penal Code, §841 do not invalidate searches incident to the arrest.

The appellant has cited a number of cases dealing with California Penal Code, §841 which is the "knock, announce and enter" arrest statute in California. As is pointed out in appellant's brief violations of this statute have been held as grounds for suppression of evidence. However, the California Supreme Court (Traynor, J.) has stated that violations of §841 have no bearing upon a search incident to an otherwise valid arrest. In People v. Maddox, supra, the court stated:

> "If the officer has reasonable cause to make an arrest, a violation of §841 would be unrelated and collateral to the securing of evidence by a search incident to the arrest, for what the search turns up will in no way depend on whether the officer informed 'the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it.' "

See also People v. Ruiz, 196 Cal. App. 2d 695, 16 Cal. Rptr. 855 (1961).

The cases dealing with §841 can clearly be distinguished from the reasoning surrounding §841. When officers violate §844 they are entering a dwelling in an unreasonable manner, something which is clearly prohibited by the Constitution. However,

violations of §841 have no basis in Constitutional rights since the Constitution does not delineate any manner in which arrests should be made. A violation of §841 is merely the violation of a statute with no other rights appended.

Therefore, it would appear that whether or not the wardens complied with the formal arrest routine, at least, as far as §841 is concerned, is quite irrelevant when considering the validity of a search incident to the arrest otherwise valid. If there was probable cause for the arrest, such having been previously established by the Government, then a search incident to the arrest does not depend on the formalities of §841 for its validity.

4. Conclusion.

In conclusion the Government would submit that there was in fact a valid arrest of appellant when he was reduced to the custody of the warden on the beach. Furthermore, because of the circumstances, the wardens did not have to comply with the formal requirements of §841 of the California Penal Code since both a statutory and case law exceptions apply here. Therefore, the arrest did comport with the law of California. Finally, the search incident to the arrest may not depend on the rendition of the formal routine by the wardens if the arrest was otherwise valid.

Therefore, there was a valid arrest of the appellant, and any search was also valid as incident to it.

D. THE SEARCH WHICH PRODUCED THE MARIHUANA, USED AS EVIDENCE AGAINST APPELLANT, WAS VALID UNDER A NUMBER OF THEORIES

The real heart of the appellant's dispute with the Government is that there was a search by Warden DuPont (for lobster) which produced a duffle bag filled with marihuana. In addition to the reasons alluded to above, the Government submits that the search is readily justified on a number of grounds.

The situation here involves the search of an automobile since the duffle bag was found on the tailgate of the station wagon parked at the top of the cliff. Therefore, the Court's attention must be directed toward this area of the law which differs in part from the normal law of search and seizure.

The courts have held that there are two instances where the search of an automobile without a warrant may be justified. There may be a search incident to a valid arrest, or if the search is conducted apart from the arrest it may be justified by the doctrine of "exigent circumstances". Also, in California, Fish and Game Wardens may make inspections for illegally taken lobster and this could be used to validate the search.

1. The search was made incident to the arrest of appellant.

Since the Government contends that the appellant was arrested when he was reduced to the custody of the wardens, the most logical way to justify the search is to say that it was incident

to the arrest. Search incident to a lawful arrest is a practice of ancient origin and has long been an integral part of the law enforcement procedures of the United States. Harris v. United States, 331 U.S. 145, 150 (1947).

At least since the pronouncement of Carroll v. United States, supra, at page 151, an automobile may be searched without a warrant if incident to an arrest. Furthermore, both California and Federal courts have held that an automobile not occupied by the arrestee at the time of the arrest may be searched incident even if some considerable distance intervenes between the arrest site and the location of the vehicle. Rhodes v. United States, 224 F. 2d 348 (5th Cir. 1955) (100 yards); United States v. Fortier, 207 F. Supp. 516 (D. C. Conn. 1962) (250 feet); People v. Williams, 67 Cal. 2d 226, 60 Cal. Rptr. 472, 430 P. 2d 30 (1967) (one block); People v. Dailey, 157 Cal. App. 2d 649, 321 P. 2d 469 (1958) (50-60 feet).

With the above-cited case law in mind, the Court is respectfully directed to the facts of the instant case. The appellant was taken into custody on the beach at the base of a cliff which could be climbed via a stairway. Immediately thereafter, Warden DuPont ran up the stairs, and found a station wagon with a duffle bag resting on the rear tailgate. The bag was similar to the one that the appellant was carrying and the ones on the beach. The warden paused briefly in his pursuit, and opened the bag wherein he found the marihuana.

Clearly, this was a search incident to the arrest of

appellant. It took place some distance from the site of the arrest, but not more than a few minutes had passed. The bag was of the same type as those on the beach.

2. Under California law, a search of a motor vehicle if substantially contemporaneous, may be incident to a subsequent arrest.

Interestingly enough, the California Supreme Court has held that a search of a motor vehicle may be incident to a subsequent arrest if the two events were substantially contemporaneous. The fact that the search occurred first in time does not render it unlawful. People v. Williams, supra, page 229. In that case a burglar abandoned his automobile after "spinning out", and the police searched it fifteen to twenty minutes before the defendant was apprehended.

Therefore, if one assumes for the sake of argument that the initial arrest of appellant was invalid, the search can still be validated as incident to an arrest under the doctrine of the Williams case. There was clearly probable cause for a search here, and the fact that the marihuana arrest took place afterwards may not invalidate it. It could be said that the search was incident to the subsequent arrest for narcotics violations, rather than incident to the arrest for the lobster poaching.

3. Even if the search cannot be found incident to any arrest it was still a valid search under the doctrine of "exigent circumstances".

The appellant in Section IV of his brief makes the bald

assertion that "there were no exceptional circumstances to justify the search made by one of the wardens in the manner which and at the time it occurred". (page 37). The Government would take issue with that statement, and contends that there were exceptional circumstances, and the search falls directly within the doctrine of "exigent circumstances".

This doctrine, briefly stated, is that under some circumstances peace officers are justified in making a search without a warrant in order to preserve evidence, apprehend suspects, etc. This doctrine may be applied to situations occurring before or after arrests.

The Government will first discuss what the law is in this area giving attention to searches before and after an arrest. Then the circumstances will be discussed which the Government feels rise to the level of "exigent circumstances".

Generally speaking, the Supreme Court first gave voice to this doctrine, in relation to automobile searches, in Carroll v. United States, supra, at page 151 when it stated:

> "[There is a] difference as to necessity between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods . . . concealed in a movable vessel where they readily could be put out of reach of a search warrant."

The Court has also stated in Preston v. United States, 376 U.S. 364, 366 (1964) that:

"Questions involving searches of motorcars or other things readily moved cannot be treated as identical to questions arising out of searches of fixed structures like houses.

"What may be an unreasonable search of a house may be reasonable in the case of a motorcar."

In regard to searches under exigent circumstances which occur after an arrest, this Court has generally stated in Boyden v. United States, 363 F. 2d 551, 553 (9th Cir. 1966):

"[It is the] right and duty on part of an arresting officer to seize the fruits of the crime and the instruments of the crime as evidence, at the time of arrest, if his leaving them unseized would create a danger that they would be destroyed."

Further, this Court has stated in Travis v. United States, 362 F. 2d 477, 480-81, fn. 3, (9th Cir. 1966):

"Where it is not practicable to secure a warrant to search a vehicle for contraband goods because the vehicle can be quickly removed out of the locality or jurisdiction, the vehicle may be searched by a proper official then having probable cause to believe that the vehicle contains such goods."

The same type of thinking is shared by the California Supreme Court. See People v. Webb, 66 Cal. 2d 107, 56 Cal. Rptr. 902, 424 P. 2d 342 (1967) (In bank).

There have also been cases which apply the doctrine of exigent circumstances to situations where the search takes place prior to any arrest. This Court has said in Cipres v. United States, 343 F. 2d 95, 98, 99 fn. 9 (9th Cir. 1965):

> "A prior search may be valid as incident to a substantially contemporaneous arrest without a warrant, if the arresting officers had probable cause for the arrest at the time of the search, and the circumstances suggested that immediate search was necessary to preserve material subject to seizure.
>
> "The 'exigent circumstances' exception to the general rule requiring a search warrant is independent of that permitting a warrantless search incident to a valid arrest (citations), and if applicable it would be immaterial that the arrest followed the search, or that there was no arrest at all. The only relevant inquiry would be whether it was probable that contraband was both present and threatened with imminent removal and destruction."
>
> (Emphasis added.)

Consider also Boyden v United States, supra; Caldwell v.

United States, 338 F. 2d 385 (8th Cir. 1964); People v. Williams, supra.

Therefore, it is clear that many times the search of an automobile is justified when the search of a house would not be. Of course, this search must be based on probable cause, but the Government would direct the Court's attention to Section "A" of this brief. It is patently clear that there was probable cause to make a search in this case. The only question that remains is whether, assuming for the sake of argument that there was not a valid arrest, there were sufficient "exigent circumstances" to justify the search. The Government submits that the only answer to this question is, "yes, there were more than sufficient exigent circumstances to justify such a search."

The Government will discuss the "exigent circumstances" for the search generally, however, the Court should consider them (1) in relation to the arrest of the appellant on the beach, and/or (2) assuming there was no arrest on the beach, in relation to the theory that the search was valid in and of itself.

Once again the facts relative to the search are these: the wardens had been observing the defendant and his companions for a period of time. Through their observations the wardens were convinced that the persons watched were bringing in illegal lobsters. After the wardens ran out to the defendant and confronted him with their identification, the situation began to deteriorate. The boat from which the contraband had been unloaded "got underway" and headed straight out to sea. The two individuals who had

carried two bags of contraband up the cliff began to run. The warden, in an attempt to apprehend the fleeing suspects ran after them, and found instead the station wagon with the duffle bag of marihuana on the tailgate. The two suspects were still at large and could have been lurking nearby.

Thus, the warden was confronted with a situation where a number of suspects both in the boat and on land were fleeing. A bag of what he believed to be illegal lobsters was inside an automobile which was parked on the cliff top. He did not know who had the keys to that automobile, and therefore, it would be reasonable to believe that one of the fleeing suspects could return at any moment and drive the automobile with the bag away, or at the very least, hide the bag in a convenient place. The warden checked the bag to confirm his belief that it contained lobsters, because under the reasoning of the above-cited cases it was his right and duty to search the bag because there was a danger that the evidence might be destroyed or removed.

Therefore, the Government submits that even if the search cannot be justified as incident to an arrest, nevertheless, the overwhelming exigent circumstances here justify the search either after the arrest on the beach, or, in and of itself, prior to the narcotics arrest.

3. In addition to the normal justification for a search, California Game Wardens have a statutory right to inspect containers which they suspect contain illegal lobsters.

In addition to the reasons stated above, the search of the

duffle bag can be justified on yet a third ground. California Fish and Game Wardens are authorized by statute to make inspections relative to their duties. At the hearing on the motion to suppress there was a discussion of the right of California Game Wardens to make inspections under §1006(a) of the California Fish and Game Code (R. T. pp. 231-232, 236). The Court's thinking was influenced by this, as part of the justification for denying the motion was based on the inspection right (R. T. p. 246).

California Fish and Game Code §1006(a) reads in pertinent part as follows:

> "The Department may inspect the following:
>
> "(a) All boats, markets, stores, and other buildings, except dwellings, and all receptacles, except the clothing actually worn by a person at the time of inspection, where birds, mammals, fish, or amphibia may be stored, placed or held for sale or storage."

The appellant's quarrel with the Government regarding this statute is that he feels the court applied it with a broad brush, and did not use a "reasonableness" standard when considering the possibility of a justified inspection. However, this is just not the case as the Reporter's Transcript revales.

The court and defense counsel entered into a colloquy concerning the standard applicable when determining whether an inspection under §1006(a) is constituionally permissible (R. T.

pp. 231-34). The following is a sample of the discussion.

"MR. TARLOW: . . . A Fish and Game Warden is in fact governed by the same probable cause standards as any other person" (R. T. p. 231).

"THE COURT: That may be true. At the same time he isn't governed by the same standards in conducting a search that an ordinary officer is." (R. T. pp. 231-32).

This reasoning of the Court is borne out by the case of Camara v. Municipal Court, 387 U.S. 523 (1967), cited by appellant, which overruled in part the prior decision of Frank v. Maryland, 359 U.S. 360 (1959).

The Court in Camara stated at 387 U.S. 523, 539:

"Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations."

Further, the Court stated at 387 U.S. 523, 536:

"There can be no ready test for determining reasonableness than by balancing the need to search against the invasion which the search entails."

Explaining its reasoning in this regard even further the Court remarked at 387 U.S. 523, 535:

"In determining whether a particular inspection is reasonable, and thus in determining whether there is probable cause . . . for that inspection, the need for the inspection must be weighed in terms of these reasonable goals of code enforcement."

This reasoning was further amplified in the companion case See v. City of Seattle, 387 U.S. 541, 545 (1967):

"The agency's particular demand for access will of course be measured, in terms of probable cause . . ., against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation." (Emphasis added.)

What can be gleaned from the reasoning of these two cases is that there is a little different standard of probable cause in inspection cases. While probable cause is still required, nevertheless, it is perhaps of a lower quality. This was the reasoning of the trial court here, and the Government submits that it was the correct reasoning.

The court stated its reasoning as to §1006(a) at R. T. page 246:

"I think the search, in any event, was valid even though there has not been an arrest, a legal arrest, for the reason that §1006 of the Fish and Game Law

seems to authorize officers acting under that statute to inspect just under such circumstances as existed here, and the type of containers that existed here." (Emphasis added.)

Therefore, it is clear that while the court perhaps did not apply the usual search and seizure standards of probable cause, nevertheless it did consider the circumstances and apply a probable cause standard to justify the inspection. This inspection standard is supported by the cases cited above.

Thus, the decision whether §1066(a) violates the Constitution need not be made, since the reasoning of the trial court clearly falls within constitutional boundaries.

But, if the Court decides that the regular standard of probable cause is necessary there is more than enough here. As set forth in Section "A" of appellee's brief, the wardens were firmly convinced that appellant had committed violations of the California Fish and Game Code. All of the facts and circumstances on that chilly October evening pointed to exactly that, and there can be no denying that the wardens had just cause to inspect those duffle bags. The inspection was firmly grounded in probable cause, and perfectly legal within the dictates of the California Fish and Game Code and the Fourth Amendment to the Constitution.

4. Conclusion.

In conclusion, the Government submits that the search of the duffle bag resting on the tailgate of the station wagon can be

justified in a number of ways.

1. It was incident to a lawful arrest of the appellant.

2. Even if it were not incident to a lawful arrest, the exigent circumstances demanded that the search be undertaken at the time and in the manner that it was conducted.

3. California Fish and Game Wardens have an inspection right under the Fish and Game Code.

a. The Court in determining the propriety of this inspection right under the circumstances of this case, applied a valid probable cause standard.

b. There was more than enough probable cause for an inspection.

IV

FINAL CONCLUSION

In light of the above-cited cases and statutes, the Government respectfully submits that this Court should deny each and every ground stated by appellant on appeal. The motions were properly denied by the trial court and appellant should stand convicted.

Respectfully submitted,

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